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THE CHALLENGE OF SUPREME COURT BIOGRAPHY: THE CASE OF CHIEF JUSTICE REHNQUIST

THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST. By John A. Jenkins.¹ New York, N.Y.: PublicAffairs. 2012. Pp. xxi + 330. \$28.99 (cloth).

*Christopher W. Schmidt*²

I. INTRODUCTION

The Partisan, a new biography of Chief Justice William H. Rehnquist by John A. Jenkins, is a bad book. But it is a bad book that is worth engaging because it provides important information about its unquestionably important subject.³ It is also worth engaging because its shortcomings, while pronounced, even egregious, in fact derive from challenges inherent in the enterprise of Supreme Court biography.

I pursue three goals in this review. First, I identify what is useful in *The Partisan*: information, some new, some helpful elaborations of what was already known, which helps us better understand Chief Justice Rehnquist, the private man and the

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3. THE PARTISAN is the first book-length biography of Chief Justice Rehnquist. There have been numerous books on the Supreme Court under Rehnquist's leadership. See, e.g., HERMAN SCHWARTZ, THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT (2002); JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT (1995); JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT (2007); MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW (2005). There have been books on Rehnquist's jurisprudence. See, e.g., SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION (1989); THE REHNQUIST LEGACY (Craig M. Bradley ed., 2006). And there have been countless law review articles about Rehnquist's work on the Court. See, e.g., 58 STAN. L. REV. 1661 ("Symposium: Looking Backward, Looking Forward: The Legacy of Chief Justice Rehnquist and Justice O'Connor"). Prior to THE PARTISAN, the only book-length biographical study of Rehnquist was a celebratory "portrait" written by one of Rehnquist's close friends. HERMAN J. OBERMAYER, REHNQUIST: A PERSONAL PORTRAIT OF THE DISTINGUISHED CHIEF JUSTICE OF THE UNITED STATES (2009).

public jurist. Second, I examine what Jenkins is trying to do in this book and where he runs into problems. The most obvious flaw of this biography is its relentless tendentiousness. The author clearly dislikes Rehnquist, and he uses the biography as a vehicle for an extended, largely unpersuasive, ad hominem attack on his subject. But Jenkins' goal is not merely to criticize Rehnquist the jurist. It is to "unmask" (p. xix) Rehnquist, to conflate his personality and his judicial views and thereby reveal the core of the man. Jenkins, predictably, finds what he was looking for: a harsh, uncaring, and deeply conservative ideologue. But in the process he presents a version of Rehnquist that not only fails to align with certain known facts about the man, but also lacks the complex humanity of a fully drawn biographical subject. Finally, I argue that the problems that this particular book puts in high relief are in fact symptomatic of the genre of Supreme Court biography. My critique thus provides a platform to consider the unique obstacles faced by any biographer of a Supreme Court Justice.

II. WHAT WE LEARN ABOUT REHNQUIST

A. REHNQUIST AND THE CHALLENGE OF BIOGRAPHY

The life of any public figure might be divided into three categories. There is the public life. For a Supreme Court Justice this would include written opinions, public statements, information about relations with other Justices, and the like. There is the private life. This would include biographical information about the Justice's upbringing and education, relations with family and friends, activities and interests beyond the Court. And then there is the personal. This would include some difficult-to-define combination of personality, character, and self-identity. For the biographer, it is the reconstruction of this last, interior layer, what Judge Richard Posner has labeled the "essential self,"⁴ that pulls together, and gives meaning to, the various strands of the subject's life.

The measure of a great biography is its ability to present a compelling portrait of the subject, one in which public, private, and personal align into a singular, comprehensible identity—but one that is not so reduced that it loses the complexities and texture of the human being at the center of the study. The explanatory force of a biography lies in its ability to allow each of the three

4. Richard A. Posner, *Judicial Biography*, 70 N.Y.U. L. REV. 502, 504 (1995).

realms of the subject's life to bring insight to the others. This is where the unique value of a biographical approach to law is located: The biographer reshapes our understanding of the subject's public life in light of those elements of the subject's life that are less well known.

These considerations highlight why Rehnquist is a particularly difficult subject for the biographer. He insistently, even belligerently, resisted introspection. Rehnquist was a prolific author throughout his time on the Court, writing about a wide variety of topics, including the Court's history⁵ and the challenges of judging and constitutional interpretation.⁶ At one point he even drafted a novel about a judge and his clerk that clearly drew on his own experiences. But he recoiled at the idea of writing directly about himself. To write an "interesting" memoir, he explained in 2001, "you have to say that 'this is a good person,' 'that's a bad person,' 'that's a medium person,' 'he really let me down here.' And I just don't want to do that."⁷ Rehnquist simply did not like talking about himself, friends explained.⁸ His autobiographical opening to his book on the Supreme Court is self-conscious and stilted.⁹ He rarely gave interviews, and when he did he generally avoided saying anything particularly interesting about either himself or his approach to judging. Judge Posner once described the "general challenge of judicial biography" as figuring out how to "write empathetically and arrestingly about dullish people who are not introspective."¹⁰ Whether or not this is a fair assessment of the judicial profession, Chief Justice Rehnquist did little to undermine Judge Posner's observation.

So perhaps it is not surprising that Jenkins found relatively little in his research on Rehnquist to reveal any sort of inner, personal world. This was a man who simply did not seem interested in exploring this terrain. Or if he did, he was not about to reveal his findings anywhere that a biographer might find them. The journals Rehnquist kept as a college and law student were filled with irreverent commentary about his studies, humorous sketches, and prosaic details of his travels, but not much revealing information beyond this (pp. 17, 23). When, later in life, he added

5. See, e.g., WILLIAM H. REHNQUIST, *THE SUPREME COURT* (rev. ed. 2002).

6. See, e.g., William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

7. Charles Lane, *Head of the Class*, STAN. MAG. (July/Aug. 2005) (quoting 2001 Charlie Rose interview).

8. *Id.*

9. REHNQUIST, *supra* note 5, at 3–20.

10. Posner, *supra* note 4, at 516.

occasional entries to these journals, they consisted mostly of quotations from history books and biographies he was reading (pp. 79–80). Those insights we get into the personal side of Rehnquist in *The Partisan* are largely from the outside, and usually from a distance.

Jenkins is similarly unsuccessful at shedding new light on Rehnquist's public side. As I discuss in more detail below,¹¹ when it comes to legal issues Jenkins is an unreliable, under-informed, and thoroughly biased guide. There is little of value in his scattershot and cursory engagement with Rehnquist's legal thought and doctrinal contributions.

What contributions there are in *The Partisan*, then, consist largely of Jenkins' exploration into two areas of Rehnquist's life story that fall within the aforementioned category of the "private." Jenkins offers much information about Rehnquist's work and political activities prior to becoming a Justice.¹² Here we find a smart, curious, and often irreverent young man dedicated from his early years to a confident, doctrinaire, libertarian-inflected conservatism. It was this combative conservatism that would attract the attention of the Nixon Administration, setting in motion his appointment to the Supreme Court in 1972. The other area of Rehnquist's life for which Jenkins provides new insight is his extracurricular activities during his time on the bench. Although a notably constant man in many ways, there was a restless quality to Rehnquist's mind, one that expressed itself in his constant search for new challenges and diversions. As a justice he cultivated a variety of outside interests, never allowing the work of the Court to dominate his life.

B. THE PRE-COURT YEARS

1. Upbringing and Education

Jenkins, like others before him, identifies the roots of Rehnquist's conservative political and legal commitments in his family and the community in which he was raised.¹³ Born in 1924, Rehnquist grew up in Shorewood, Wisconsin, a suburb of Milwaukee on the shores of Lake Michigan. His political leanings

11. See *infra* Part II.

12. Jenkins dedicates approximately half of this relatively short biography (the text comes in at just over 250 pages) to Rehnquist's pre-Court years.

13. See, e.g., George Lardner Jr. & Sandra Saperstein, *A Chief Justice-Designate With Big Ambitions*, WASH. POST, July 6, 1986, at A1.

formed early. He was raised in an anti-New Deal Republican family in a community that was, even at the height of the New Deal, staunchly Republican.¹⁴ The town was all-white, its inhabitants accepting of a casual, seemingly unchallenged racial insensitivity (during his time as a student, Rehnquist's high school held a Harlem-themed prom) (p. 3).

The subsequent steps in his life reflected the characteristics that were coming to define Rehnquist: he was bright and confident as a student; he was impatient; he could be irreverent; and he was politically conservative. Rehnquist received a scholarship to Kenyon College in Ohio. After a semester at Kenyon, he enlisted in the Army. Toward the end of the war, he shipped out to North Africa, where he served as a weather observer for the Army Air Corps. After his return to the United States in early 1946, Rehnquist attended Stanford University, supported by the G.I. Bill and various part-time jobs (p. 13). He graduated in just two years with both bachelor's and master's degrees in political science. After a brief, disappointing stint as a graduate student in the Government Department at Harvard, he abandoned his thoughts of becoming an academic and returned to Stanford for law school. Jenkins brings together scattered evidence of the sharpening conservative commitments of the young Rehnquist: while serving in North Africa, Rehnquist was impressed by Friedrich von Hayek's *Road to Serfdom*, the recently published free-market manifesto (p. 14);¹⁵ his Stanford master's thesis articulated a narrow, libertarian-styled vision of individual rights (p. 22);¹⁶ his disillusionment with Harvard stemmed at least partly from his professors' liberal leanings (pp. 24–25). During his time at Stanford Law School, he was, according to one profile, “widely regarded as both outlandishly conservative and outlandishly bright.”¹⁷ At Stanford, Rehnquist was editor-in-chief of the *Law Review* and graduated a semester early (p. 26).

2. Supreme Court Clerkship

While we have only scattered writings and recollections to reconstruct Rehnquist's nascent political and legal attitudes up to

14. *Id.*

15. FRIEDRICH A. HAYEK, *ROAD TO SERFDOM* (1944).

16. William Hibbs Rehnquist, *Contemporary Theories of Rights*, 58 STAN. L. REV. 1997 (2006) (reprint of Rehnquist's 1948 master's thesis). For a laudatory analysis of Rehnquist's thesis, see Douglas W. Kmiec, *Young Mr. Rehnquist's Theory of Moral Rights—Mostly Observed*, 58 STAN. L. REV. 1827 (2006).

17. Lane, *supra* note 7.

this point, the paper trail becomes far more revealing during the next stage of Rehnquist's life, when he clerked for U.S. Supreme Court Justice Robert H. Jackson. Rehnquist's memorandums for Justice Jackson, which came to public attention during his confirmation hearings to the Supreme Court in 1971,¹⁸ have been thoroughly examined by scholars.¹⁹ The most famous was one in which the clerk confidently weighed in on the merits of the pending *Brown v. Board of Education*. Titled "A Random Thought on the Segregation Cases," Rehnquist urged the Court not to involve itself in the school segregation issue, a position he located within a broader skepticism toward the judicial defense of individual rights against state regulation. "[I]t was not part of the judicial function to thwart public opinion except in extreme cases,"²⁰ he wrote. State racial segregation policy "quite clearly is not one of those extreme cases which commands intervention" ²¹ He concluded: "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues [sic], but I think *Plessy v. Ferguson* was right and should be re-affirmed."²²

Rehnquist further elaborated on his views in memos involving a case of racial exclusion from party primaries.²³ Again, he portrayed himself as a voice of reason—"a lawyer, rather than a crusader"—standing up against a crowd of liberals engaged in a

18. See, e.g., John P. MacKenzie, *Controversy Deepens over Rehnquist Memo*, WASH. POST, Dec. 10, 1971, at A1.

19. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 304-09 (2004); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 604-09 (1976); WILLIAM M. WIECEK, THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941-1953, at 696-703 (2006); Saul Brenner, *The Memos of Supreme Court Law Clerk William Rehnquist: Conservative Tracts, or Mirrors of His Justice's Mind?*, 76 JUDICATURE 77 (1993); Laura K. Ray, *A Law Clerk and His Justice: What William Rehnquist Did Not Learn from Robert Jackson*, 29 IND. L. REV. 535, 553-59 (1996); Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson and the Brown Case*, 1988 SUP. CT. REV. 245, 245-47; Brad Snyder & John Q. Barrett, *Rehnquist's Missing Letter: A Former Law Clerk's 1955 Thoughts on Justice Jackson and Brown*, 53 B.C. L. REV. 631 (2012); Brad Snyder, *What Would Justice Holmes Do (WWJHD)?: Rehnquist's Plessy Memo, Majoritarianism, and Parents Involved*, 69 OHIO ST. L.J. 873, 873-76 (2008).

20. Memorandum from William H. Rehnquist to Justice Robert H. Jackson, "A Random Thought on the Segregation Cases" (undated), Robert Houghwout Jackson Papers, Library of Congress, Manuscript Division [hereinafter *Jackson Papers*], Box 184, Folder 5, reprinted in *Nomination of Justice William Hubbs Rehnquist: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 314 (1986) [hereinafter *1986 Nomination Hearings*].

21. *Id.*

22. *Id.* at 315.

23. *Terry v. Adams*, 345 U.S. 461 (1953).

“pathological search for discrimination.”²⁴ His reasoning here moved beyond the posture of the neutral, post-*Lochner* constitutional lawyer dedicated to judicial deference except in “extreme” cases. He adopted a more substantive—and frankly conservative—vision of race relations:

It is about time the Court faced the fact that the white people on [sic] the South don’t like the colored people; the Constitution restrains them from effecting this dislike through state action, but it most assuredly did not appoint the Court as a sociological watchdog to rear up every time private discrimination raises its admittedly ugly head.

He emphasized the costs civil rights imposed on other constitutional values, namely “freedom of association” and “majority rule.”²⁵

Jenkins follows in the long line of scholars who have concluded that Rehnquist’s later attempts to disown the contents of these writings were disingenuous: at the time he wrote the memos, Rehnquist clearly subscribed to the positions he outlined. The evidence is simply overwhelming.²⁶ Jenkins supplements the language from Rehnquist’s memos with a letter Rehnquist wrote to Justice Frankfurter soon after Jackson’s death in October 1954, in which he expressed his disappointment with Jackson—a disappointment likely connected to Jackson’s refusal to follow Rehnquist’s advice on the civil rights cases.²⁷ Jenkins also references Rehnquist’s admission during his 1984 interview with the Justice that, with regard to *Brown*, “there was a perfectly reasonable argument the other way” (p. 43).²⁸

3. Phoenix

Jenkins provides some helpful information about the next stage of Rehnquist’s life as well. In the summer of 1953, Rehnquist left Washington, D.C., for Phoenix (chosen for the weather, he often explained) to practice law. He married Natalie “Nan”

24. Cert. memo from William Rehnquist to Justice Robert Jackson on *Terry v. Adams* (undated), Jackson Papers, Box 179, Folder 9, reprinted in 1986 *Nomination Hearings*, *supra* note 20, at 312.

25. Memorandum from William H. Rehnquist, Regarding the Opinions of Justices Black and Frankfurter in *Terry v. Adams*, Jackson Papers, Box 179, Folder 9, reprinted in 1986 *Nomination Hearings*, *supra* note 20, at 313.

26. See texts cited, *supra* note 19.

27. See Snyder & Barrett, *supra* note 19.

28. John A. Jenkins, *The Partisan: A Talk with Justice Rehnquist*, N.Y. TIMES MAG., Mar. 3, 1985, at 28, 30.

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Cornell, whom he had met while in law school, and settled into law practice and family life. He and Nan raised a son and two daughters. He ventured into political activity, mostly on the local level.

As extensively documented in the record collected years later for his 1971 nomination to the Supreme Court, Rehnquist's speeches and activities during this period were starkly and aggressively conservative and libertarian. He attacked the Supreme Court for its liberal leanings, which he blamed in part on the influence of liberal law clerks.²⁹ And he stood opposed to civil rights reform—a position that, along with his memorandum on *Brown*, would become a focal point in his confirmation hearings.

We see in these statements a further elaboration of Rehnquist the sociologist of race, stepping outside the legalist shield of deference to majoritarian outcomes and formal procedures to offer his own, quite pessimistic account of the nature of race relations in America. In 1964, Rehnquist publicly opposed a Phoenix ordinance that would prohibit restaurants and other public accommodations from discriminating based on race, declaring it an affront to private property rights. Rehnquist's libertarian commitments were well on display in his testimony before the city council when he declared that people came to Arizona because of their commitment to “[f]ree enterprise, and by that I mean not just free enterprise in the sense of the right to make a buck but the right to manage your own affairs as free as possible from the interference of government.”³⁰ Rehnquist also grounded his opposition to civil rights policy on a skepticism toward the capacity of law to uproot the deeply entrenched racial prejudice he saw coursing through social relations. As he wrote in a letter to his local newspaper, civil rights law is “[u]nable to correct the source of the indignity to the Negro,” which was “the state of mind of the proprietor who refuses to treat each potential customer on his own merits.”³¹

He applied similar libertarian reasoning to school desegregation policy. In a letter to the editor of the *Arizona*

29. See also William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REP., Dec. 13, 1957, at 74.

30. Comments of William Rehnquist, Made June 15, 1964, at the Public Hearing on the Public Accommodations Ordinance Proposed for the City of Phoenix, reprinted in *Nominations of Justice William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the S. Comm. on the Judiciary*, 92nd Cong. 305 (1971) [hereinafter *1971 Nomination Hearings*].

31. William H. Rehnquist, *Public Accommodations Law Passage is Called “Mistake,”* ARIZONA REPUBLIC, reprinted in *1971 Nomination Hearings*, supra note 30, at 307.

Republic, written in the midst of a 1967 debate over a school desegregation plan, Rehnquist challenged the Phoenix school superintendent for declaring “achieving an integrated society” his guiding goal in framing school assignment policy.³² “[W]e are no more dedicated to an ‘integrated’ society than we are to a ‘segregated’ society,” Rehnquist wrote; “we are instead dedicated to a free society, in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual activities.”³³

During his pre-Court years, Rehnquist staked out political and legal positions on the far right end of the ideological spectrum. By the late 1960s, his positions on race were being pushed beyond the pale of politically acceptable opinion. This fact would almost derail his appointment to the Supreme Court.

4. In the Nixon Administration

Rehnquist’s legal and political activities brought with them connections that would eventually return him to Washington. When Barry Goldwater, the United States Senator from Arizona, ran for President in 1964, Rehnquist served as a speechwriter and advisor (pp. 73–74).³⁴ Rehnquist became close to Richard Kleindienst, a lawyer with extensive connections in Arizona Republican politics who was appointed deputy attorney general in the Nixon Administration. He, in turn, got Rehnquist appointed to run the Office of Legal Counsel (p. 77). In early 1969, the forty-four-year-old Rehnquist was back in the nation’s capital.

Rehnquist spoke out, in public and behind closed doors, aggressively advancing his political and legal commitments—which aligned well with the right wing of the Nixon Administration. He was a law-and-order advocate through and through. He warned of the “barbarians of the new left,” who “constitute[] a threat to the notion of government of law which is every bit as serious as the ‘crime wave’ in our cities” (p. 82). He set to work on one of Nixon’s central campaign issues, rolling back the Warren Court’s expansion of criminal rights. He prepared a lengthy critique of the Warren Court decisions in the area of

32. William H. Rehnquist, *‘De Facto’ Schools Seen Serving Well*, ARIZONA REPUBLIC, Sept. 9, 1967, reprinted in 1971 *Nomination Hearings*, *supra* note 30, at 309.

33. *Id.*

34. See also RICK PERLSTEIN, BEFORE THE STORM: BARRY GOLDWATER AND THE UNMAKING OF THE AMERICAN CONSENSUS 424-25, 461-62 (2001); TUSHNET, *supra* note 3, at 23-24.

criminal justice in which he suggested that rectifying the damage the Court had wrought might require a constitutional amendment and proposed a presidential commission to consider the possibility. A particular target of his attack on the Warren Court was *Miranda v. Arizona*,³⁵ in which the Court required police to inform suspects, prior to questioning, about their right to remain silent and to counsel.

With the retirements of Justices Black and Harlan in 1971, two new Court openings materialized. One went to Lewis Powell. The other, after some debate within the Nixon Administration, went to Rehnquist. Nixon and his advisors saw Rehnquist as an impressively credentialed lawyer who would please conservative elements in the Republican Party. A relative unknown on the national legal scene, his confirmation hearings were largely uneventful. Controversy arose, however, in the period after the hearings had concluded but before his confirmation vote in the Senate. This was when *Newsweek* broke the story of Rehnquist's *Brown* memorandum.³⁶ Rehnquist's disingenuous explanation that the memos were an effort to capture Justice Jackson's views, not his own, quelled the potential controversy, and the Senate approved his nomination with a vote of 70 to 22. On January 7, 1972, at age forty-seven, Rehnquist took his seat on the Court.

C. THE COURT YEARS

At this point, with Rehnquist an Associate Justice on the Supreme Court, Jenkins' biography moves back and forth between Rehnquist's public life as a Justice and his off-the-Court interests and activities. The material on his Court work is thin. What Jenkins lacks in new insights he fills with a padding of blunt and unceasing criticism of Rehnquist's jurisprudence.

Jenkins does provide some interesting material, however, about Rehnquist's private life during his Court years. The most powerful revelation to emerge from the biography was the extent to which Rehnquist chafed against the isolation he felt upon landing at the apex of the American legal system. Practically from the moment he arrived he was looking for opportunities to shake up the staid, formal routines of the Court. Early in his tenure, he offered Chief Justice Burger proposals for enlivening the work of the Justices (introducing a coffee hour following oral arguments, redecorating the dining room, having the clerks put on a satirical

35. 384 U.S. 436 (1966).

36. *Supreme Court: Memo from Rehnquist*, NEWSWEEK, Dec. 13, 1971, at 32.

skit), which Burger promptly shot down (p. 170). Intensely competitive, Rehnquist was always trying to set up wagers with his colleagues on matters big and small (pp. 171, 197–201). He enjoyed playing jokes, some quite elaborate, on his colleagues (pp. 171–75). And there were of course those four gold stripes on his black robe, which appeared in 1995, inspired by the character of the Lord Chancellor in a production of Gilbert and Sullivan's *Iolanthe* (p. 253).³⁷

One fascinating point that comes out quite clearly in this behind-the-scenes portrait of Rehnquist was the connection he formed with his very senior colleague, William O. Douglas. It would be hard to find two Justices who on the surface had less in common. Douglas was the New Deal firebrand, the visionary civil libertarian, the discoverer of the constitutional right to privacy in the penumbras and emanations of the Bill of Rights. Rehnquist opposed all of this. Their personal lives were also far, far apart. Douglas was the womanizer who married four times, each new wife younger than the last. Rehnquist, by all indications, was deeply dedicated to Nan until her death in 1991. Douglas was notoriously harsh to his clerks, and he had prickly relations with his colleagues. Rehnquist was generally beloved by clerks and colleagues. Yet the two men, who were on the Court together from 1972 until Douglas' retirement in 1975, shared a roving, iconoclastic intellectual brilliance. Rehnquist admired Douglas, singling him out for his ability to “[n]ot be[] bamboozled by currents, trendy ideas” (p. 151). Douglas respected his younger colleague's intelligence and he urged Rehnquist to cultivate his life outside the Court. The ideological odd couple shared time with their wives at Douglas' summer cabin (pp. 152–53).

Rehnquist followed Douglas' advice and went searching for outside activities—for ways, as Rehnquist put it, to “get away from the monasticism” of the Court (p. 154). “You just have to keep anchors to the outside world,” Rehnquist explained, “because a justice of this Court could do all of the work he has to do in discharge of his oath of office without ever leaving this building. . . . [I]t's a two-dimensional world if you let that happen to you” (p. 154). He accepted invitations to give speeches and talk to law school classes. He took painting classes, read

37. According to Justice Stevens, following an international trip in which the Chief Justice saw justices from various countries wearing different colored robes, Rehnquist suggested to his colleagues a change from their traditional black. There were no takers, but Rehnquist went ahead on his own. JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 173 (2011).

voraciously, and played poker with friends. And he tried his hand at writing fiction.

Jenkins dedicates a chapter to Rehnquist's failed efforts to become a novelist. Rehnquist spent the summer of 1974 writing a draft of a short novel, a legal drama centered around a federal judge and his clerk. Was the novel any good? Jenkins thinks not. "[T]he writing was amateurish, the plot anything but compelling," he declares (p. 181). None of the editors who looked at the manuscript felt it publishable without a thorough and fundamental reworking (pp. 181–85), so Jenkins' uncharitable assessment appears not far from the mark. Rehnquist, who described himself as "a complete neophyte when it comes to technique" (p. 181), was an eager student initially. But when yet another editor gave Rehnquist detailed editing suggestions, making clear the "major effort" that would be required to make the novel publishable, Rehnquist became frustrated (p. 184). He took a couple more stabs at revising the manuscript in subsequent summers, but he never was able to see the project through. He lamented to his agent that "somehow the creative urge which moved me several summers ago . . . has simply not returned" (p. 185). He never gave up his goal to become a novelist, though, quietly working on other fiction writing projects. The 1990s found him working on a murder mystery and musing about possibly writing historical fiction about Custer's Last Stand (pp. 185–87).

D. REHNQUIST ASSESSED

What does all this tell us about Rehnquist? Two points are worth highlighting. First, Rehnquist formed strikingly clear ideological commitments early in life. Although he adapted these commitments to new circumstances, his basic beliefs changed little over the course of his pre-Court life. These views, typical for 1930s Shorewood, Wisconsin, sometimes made for an awkward fit during subsequent stages of his life. He felt alienated as a graduate student at Harvard, in part because of his political views; as a clerk at the Supreme Court he saw himself surrounded by left-leaning fellow clerks. The confident young lawyer adopted an embattled sensibility, which allowed him to only strengthen his conservative and libertarian commitments in the following decades, when they seemed increasingly out of step with much of the nation.

Second, Rehnquist, a man of steady temperament and habits in so much of his life, was deeply restless when it came to occupying his interests. He was constantly searching for new

activities and challenges, for new ways to change up stale routines. His impatience was evident in both his professional and private lives. He made decisions quickly. Never one to agonize, he did not second-guess decisions once made.³⁸ As he explained in his one interview with Jenkins (in 1984): “You’ve got to . . . decide one case and go on to the next one . . . [T]here’s literally no time for thinking about past decisions: Was I right or was I wrong? You’d simply go nuts if you did that” (p. 150). (The contrast with the notoriously indecisive Justice Harry Blackmun, who served on the Court from 1970 and 1994, could not have been starker.³⁹) Rehnquist wrote quickly. As Chief Justice, he cut advocates off in mid-sentence at oral arguments when their time had expired. When the Justices met to discuss recently argued cases, he ran a tight, efficient conference, more an opportunity to count votes than a discussion session. He generally arrived at the Court mid-morning and left by mid-afternoon. And, remarkable for a line of work prone to proclamations of self-importance, he enjoyed deflating the oftentimes over-exuberant rhetoric about the Court’s role in American society. It is only a “little stream of history that flows by this Court,” he explained in his interview with Jenkins. “[M]any other things . . . have a greater influence on people’s daily lives than what this Court decides” (p. 149).

III. A PARTISAN BIOGRAPHY

In a 1995 article, Judge Posner offered a useful framework for evaluating the genre of judicial biography.⁴⁰ The judicial biographer, he explained, tends to be driven by goals that are “ideological” and “essentialist”: ideological in that, whether seeking to debunk or elevate her subject, the biographer evaluates the subject through a comparison to some ideal type;⁴¹ essentialist in that the biographer seeks to identify within the subject a coherent, knowable “essential self.”⁴² *The Partisan* fits comfortably into Judge Posner’s categorization. Indeed, it reads

38. See, e.g., Linda Greenhouse, *How Not to Be Chief Justice: The Apprenticeship of William H. Rehnquist*, 154 U. PA. L. REV. 1365, 1366 (2006) (Rehnquist “did not believe in second-guessing others or—more importantly—himself. I heard him say in conversation more than once that he believed a second or third response to a problem tended to be no more valid than the initial response, and so there was little to be gained by going back to an issue again and again. He believed in simply getting the job done and moving on.”).

39. See generally LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* (2005).

40. Posner, *supra* note 4.

41. *Id.* at 503–04.

42. *Id.* at 504.

almost like a caricatured effort to demonstrate what a fully realized ideological-essentialist judicial biography would look like. And, as Judge Posner warned, it is deeply problematic.

A. THE IDEOLOGICAL REHNQUIST

One might suspect an ideological agenda on the part of this particular biographer even before the book is cracked. The title, after all, is *The Partisan*. Nothing too wrong there, though. Rehnquist was an unapologetic conservative throughout his life. His pre-Court years were marked by aggressive partisan activity. None other than the thoroughly partisan President Richard Nixon declared Rehnquist “on our side” (p. 129) and encouraged him to “be just as mean and rough as they say you were” (p. xiv) when he chose him for the Court. And there is a strong case to be made that his judicial decision making was largely an extension of his pre-Court partisan commitments. So partisanship might not be the worst of themes for his biography.

We quickly learn, however, that the “partisan” label hardly captures the Rehnquist that Jenkins wants to offer. “[T]o call Rehnquist simply a conservative,” Jenkins explains at the start of the book, “would be to miss the essence of what defined him” (p. xiv). From here, Jenkins is off and running, his condemnation of his subject gaining momentum with each sentence:

Rehnquist’s judicial philosophy was nihilistic at its core, disrespectful of precedent and dismissive of social, economic, and political institutions that did not comport with his black-and-white view of the world. Rehnquist instinctively knew whose side he was on when it came to criminals and law abiders, minorities and the white majority, the poor and the rich, the powerless and the powerful. He set his plan accordingly. Infatuated with his own genius, he spoke his mind, cast his votes, and damned his critics (p. xiv).

B. THE PROBLEM WITH IDEOLOGICAL BIOGRAPHY

The biographer’s moves on display here are worth stopping to consider. Putting aside for the moment Jenkins’ claims about Rehnquist’s character—his “essence”—the basic critique here is an ideological one: Rehnquist is conservative, and Jenkins does not like this. The goal here is to categorize Rehnquist’s political beliefs in order to marginalize them. The effect is to distance the reader from the subject by establishing an ideological baseline (some semi-articulated version of liberalism) and then showing all the ways the subject fails to meet its requirements. This is a

political critique (or, in Jenkins' unsubtle hands, more of a polemic). It is not biography.

A biographer's first responsibility is to understand his subject. This requires some level of imagination and empathy—two qualities in short supply in this particular biography. “Getting inside other people's minds,” writes one historian, “requires that your own mind be open to their impressions—their hopes and fears, their beliefs and dreams, their sense of right and wrong, their perception of the world and where they fit within it.”⁴³ Then, and only then, there is the opportunity to judge. A biography written without sympathy for the subject is a critical biography. A biography written without empathy for the subject is a failure of the craft of biography.

C. THE ESSENTIAL REHNQUIST

Jenkins' assessment of Rehnquist goes well beyond a critique of his conservative political and jurisprudential beliefs, however. According to Jenkins, Rehnquist's doctrinaire and far-right brand of conservatism was more than a failure of political judgment. It was a failure at a deeper level, a failure at his subject's core, inner being—his “essence,” in Judge Posner's formulation. “Like many public figures,” Jenkins writes, “Rehnquist presented a face to the public that often was at odds with the private man. My purpose here is to unmask that private face” (p. xix). The collegial Rehnquist was a public “mask of jollity,” behind which was “the brooding private man” (p. 34). Since the public Rehnquist was defined by a harshness and a lack of charity, so, according to Jenkins, must the private Rehnquist be defined by analogously ominous characteristics.

Critically, for Jenkins' purposes, Rehnquist's essential self, his *true* self, is at once personal and public. The two are intertwined. The key to understanding the public man is to understand the private man. As a justice, Rehnquist was a jurisprudential “nihilist,” in that he did not respect legal rules and institutions, but the roots of this nihilism, according to Jenkins, are found ingrained in his personality. He did not care about others—not about what they thought, not about their struggles. The personal becomes a window into Rehnquist's essential legal commitments; the legal becomes a window into his essential personal commitments. We behold the biographer's creation of a coherent, unitary subject.

43. JOHN LEWIS GADDIS, *THE LANDSCAPE OF HISTORY: HOW HISTORIANS MAP THE PAST* 124 (2002).

This essentializing move allows Jenkins to basically read law out of his biography. Rehnquist was “an expedient conservative” (p. xv). He was “on a partisan’s mission” (p. xv). By defining his subject as such a thoroughgoing realist—indeed, a legal “nihilist”—Jenkins’ Rehnquist is driven solely by politics, ideology, even “instinct” (pp. xiv, xv). The evidence Jenkins supplies for this characterization is thin, at best. Rehnquist, in a letter to his son, described “stare decisis” in the context of constitutional law as “pretty much of a sham” (p. 250). And in an interview he described his approach to judging as involving looking at both sides of a case and trying to determine which side had “the better point of view”—a seemingly innocuous statement that Jenkins returns to over and over again as a kind of smoking gun of Rehnquist’s lawless, results-oriented decision making process (pp. 246, 248, 249).

By demoting, even dismissing law, and elevating instinctive partisanship in its place, Jenkins sets the stage for a judicial biography largely void of legal analysis.⁴⁴ To write a biography of a jurist that focuses on issues other than his or her professional work product is, of course, perfectly defensible. Such a book would be a biography of a judicial figure, if not a judicial biography. But *The Partisan* tries to have it both ways. While de-emphasizing law and disclaiming to offer any kind of a “comprehensive survey of Rehnquist’s jurisprudence” (pp. xix–xx), Jenkins’ entire book centers on Rehnquist’s life in the law. “Rehnquist was a brilliant loner who used the Court to advance his right-wing agenda,” Jenkins writes, in what could very well serve as the biography’s thesis statement (p. xiv). Although there is a good deal of information in this book about Rehnquist’s life beyond his opinions, this is hardly a serious study of the private man. For behind the public face, what Jenkins purports to discover is not a hidden private side, but a somewhat more sinister (“brooding”) version of the public face. So the Rehnquist everyone knew, i.e., the ideological conservative, was, in fact, under the surface, an ideological conservative. The point

44. Perhaps the reader should be thankful for this. When Jenkins does touch upon matters of legal doctrine, he is prone to errors, some quite glaring. For instance, he describes *Locke v. Davey*, 540 U.S. 712 (2000), an Establishment Clause case, as the case that signaled the demise of the “federalism revolution” (p. 249). He also mangles an effort to describe the influence of Charles Fairman, Rehnquist’s professor at Stanford. He somehow links Fairman’s views on the Fourteenth Amendment’s “incorporation” of the Bill of Rights to (a) Rehnquist’s opposition to *Brown*; (b) his dissent in *Roe v. Wade*, 410 U.S. 113 (1973); and (c) his majority opinion in *United States v. Morrison*, 529 U.S. 598 (2000) (pp. 16, 37, 143).

in this unenlightening exercise is to do more than to illuminate the private Rehnquist. It is to illuminate the real, true, and essential Rehnquist, a coherent being whose public and private life was of a piece. In the end, this book seeks to demonstrate how Rehnquist used the law and the highest legal institution in the land to advance his agenda, but to do so without seriously engaging with the law. This is an enterprise destined, on its own terms, to come up short.

Jenkins has still another simplifying move to make. Not only does he write law out of Rehnquist's story, but he also defines his subject as basically unchanging in his basic views. In Jenkins' telling, the reactionary's ideas were etched in stone from the beginning. His upbringing in a comfortable Republican household in a suburb of Milwaukee ("a homogenous idyll of lakefront mansions and well-tended bungalows" (p. xviii)) made him a right-wing ideologue; his life thereafter was just a matter of locating ways to express his beliefs. His three-plus decades on the Supreme Court were exceptional in that he changed not a whit. Rehnquist offers "a unique case study," Jenkins explains, in that he was "flash frozen from the day he arrived" on the Court (p. xvii).

D. THE PROBLEM WITH ESSENTIALIZING

The basic problem with all this essentializing, all this "unmasking," is that it is so out of line with some basic facts about Rehnquist. In this section I consider two facets of Rehnquist's life that have puzzled observers, but that Jenkins' biography does nothing to illuminate. Indeed, he basically denies they are issues at all. They are: (1) Rehnquist's close personal relations with his colleagues; and (2) his apparent shift of position toward the end of his life on several major constitutional questions.

1. Personality

It is difficult to square Jenkins' harsh assessment of Rehnquist the man with his record of close friendships with his fellow Justices. As David Garrow wrote in a 1996 profile, "his colleagues were unanimously pleased and supportive" when Rehnquist was being considered for the Chief Justiceship. A lawyer who interviewed people in the Court found the prospect of Rehnquist's elevation was met with "genuine enthusiasm on the part of not only his colleagues on the Court but others who served the Court in a staff capacity and some of the relatively lowly paid individuals at the Court. There was

almost a unanimous feeling of joy.”⁴⁵ Even his ideological opponents seemed to like him on a personal level. According to Garrow, Justice William J. Brennan once privately described Rehnquist as “my best friend up here.”⁴⁶ Jenkins gives the reader no insight into why so many people—including those who passionately disagreed with Rehnquist’s legal and political commitments—liked the man. The best he can do is to suggest that Rehnquist was a great dissembler—a fake, basically. (“But behind the façade lurked a different person” (p. 163).)

Jenkins’ portrait of Rehnquist as harsh and unyielding in all walks of life simply does not add up. His colleagues consistently praised his leadership skills. Unlike his predecessor, Chief Justice Warren Burger, who was notorious both for his officiousness and the rambling Justices’ conferences he led, Rehnquist stood out for, in Justice Stevens’ assessment, his ability to handle the responsibilities of the Chief Justice “competently and impartially.”⁴⁷ On the part of his law clerks, Rehnquist evoked a sense of real affection.⁴⁸

Rehnquist could be quite compassionate to those around him. He had an irreverent sense of humor, a low-key demeanor, and, for all the confidence with which he espoused his views, a personal self-deprecation rare for someone with his achievements. To be sure, he could be harsh and uncompromising; his humor often struck a juvenile chord and it could be callous; and much of his political work prior to becoming a judge and a good deal of his work on the bench evidences a shortage of basic sensitivity for the condition of the disempowered and downtrodden in society. But Jenkins never makes anything close to a persuasive case for why his less admirable qualities should be understood as the truth of the man, while everything else nothing more than a cynical “mask.” People are contradictory and complicated. A better biographer would have recognized the contradictions and complications of Rehnquist’s life story as an opportunity.

2. Change

Another significant aspect of Rehnquist’s biography that Jenkins fails to confront is the apparent shift, toward the end

45. David J. Garrow, *The Rehnquist Reins*, N.Y. TIMES MAG., Oct. 6, 1996, at 67.

46. *Id.*

47. STEVENS, *supra* note 37, at 170.

48. See, e.g., the Maureen Mahoney interview in THE SUPREME COURT: A C-SPAN BOOK FEATURING THE JUSTICES IN THEIR OWN WORDS 288-89 (Brian Lamb et al. eds., 2010); James E. Ryan, *The Chief as Teacher*, 58 STAN. L. REV. 1687 (2006).

of his time on the Court, in his positions on certain constitutional issues. If the central theme of Rehnquist's tenure as an Associate Justice (1972-86) was his robust, often lonely conservatism (his clerks nicknamed him the "Lone Ranger" for his frequent solo dissents), the central theme of his tenure as Chief Justice (1986-2005) was something else. There was no transformation, to be sure, but there were signs of evolution, a new sensibility about his role on the Court that had something to do with his position as Chief Justice and something to do with his own reconsideration of the merits of certain constitutional positions he had previously staked out. Rehnquist's sense of institutional responsibility to the Court became more evident. He showed less interest in expounding and defending his conservative jurisprudence. His written opinions, never particularly discursive, turned terse and workmanlike—"dry and to the point," as one journalist put it.⁴⁹ And, contrary to Jenkins' relentless "partisan" thesis, Rehnquist did appear to moderate, to some extent, from the unyielding conservative jurisprudence that had defined his public life to that point.

What happened? Jenkins offers little guidance here because he basically tries to deny that anything happened at all. In some instances he does this by just ignoring decisions that fail to conform to his portrait of Rehnquist. Thus the landmark 1996 sex discrimination case involving the Virginia Military Institute⁵⁰ gets nary a mention, even though Rehnquist, a longtime critic of the Court's sex discrimination doctrine,⁵¹ joined the majority in this one⁵² (while his usual ally, Justice Scalia, wrote one of his trademark scorched-earth dissents⁵³).

In other instances, Jenkins makes cursory efforts to explain away decisions that do not fit his "flash frozen" Rehnquist. *Nevada Department of Human Resources v. Hibbs* (2003)⁵⁴ was a 6-3 decision in which Rehnquist wrote the opinion of the Court,

49. Garrow, *supra* note 45, at 70.

50. *United States v. Virginia*, 518 U.S. 515 (1996).

51. See, e.g., *Craig v. Boren*, 429 U.S. 190, 217-28 (1976) (Rehnquist, J., dissenting); *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973) (Rehnquist, J., dissenting); see generally Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1874-81 (2006) (describing Rehnquist's opposition to the ERA prior to appointment to the Court and resistance to heightened scrutiny for sex discrimination once on the Court).

52. 518 U.S. at 558-66 (Rehnquist, C.J., concurring in the judgment).

53. *Id.* at 566-603 (Scalia, J., dissenting).

54. 538 U.S. 721 (2003).

upholding congressional power under the Fourteenth Amendment to require state governments to apply the Family and Medical Leave Act to its employees. Rehnquist's decision has been something of a puzzler for scholars. Reva Siegel wrote an article on Rehnquist and *Hibbs* titled *You've Come a Long Way, Baby*.⁵⁵ The favored explanation for this surprising development attributes Rehnquist's evolution on the issue of pregnancy discrimination to his personal life. Following his wife's death in 1991, he took on more grandparenting responsibility, including helping to take care of the child of one of his daughters, a single mom working as a lawyer. Rehnquist's opinion in *Hibbs* was "such a delightful surprise," recalled Justice Ginsburg.⁵⁶

When my husband read it, he asked, did I write that opinion? I was very fond of my old chief. I have a sense that it was in part his life experience. When his daughter Janet was divorced, I think the chief felt some kind of responsibility to be kind of a father figure to those girls. So he became more sensitive to things that he might not have noticed.⁵⁷

In order to explain *Hibbs*, Jenkins offers a new twist in his assessment of Rehnquist—a twist that has the inconvenience of undermining the central thesis of his biography. Rehnquist, the unwavering conservative ideologue, the reactionary, is actually, Jenkins claims in the closing pages of the book, an adherent of "pragmatic conservatism" (p. 246). Because he doesn't care about law, but because he does care about his daughter, who is a single mother, the decision is perfectly explainable.

But wait—*Hibbs*, we now learn, "wasn't the only time that Rehnquist confounded the conservative pundits" (p. 246). (The predictable ideologue has suddenly become much more interesting.) There was also the 2000 case⁵⁸ in which Rehnquist, a long-time critic of *Miranda v. Arizona*,⁵⁹ wrote an opinion which declared that the *Miranda* warnings "have become part of our national culture,"⁶⁰ and struck down a 1968 federal law in which Congress had sought to statutorily overturn the controversial 1966 decision.

55. Siegel, *supra* note 51.

56. Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES MAG., July 12, 2009, at 46.

57. *Id.*; see also Cary Franklin, *Justice Ginsburg's Advocacy and the Future of Equal Protection*, 122 YALE L.J. ONLINE 227, 233 (2013), <http://yalelawjournal.org/2013/02/21/franklin.html> (remarks of Justice Ginsburg).

58. *Dickerson v. United States*, 530 U.S. 428 (2000).

59. 384 U.S. 436 (1966).

60. 530 U.S. at 443.

What happened here? Jenkins does not really have an explanation. Rehnquist was a “situationalist” (p. 246), meaning that he was moved by instinct, and here his gut steered him to change course. Others have provided more useful efforts at explanation. Justice Scalia assumed, plausibly, it has something to do with the institutional responsibilities of the Chief Justiceship. As an Associate Justice, Rehnquist “was a shin kicker. He was very, very opinionated. He changed when he became chief.”⁶¹ Additional evidence might be drawn from Rehnquist’s own extrajudicial writings, which were quite extensive and, prior to his elevation to Chief Justice, often quite probing and self-reflective on the role of the judge in a constitutional democracy. A particularly notable theme in the various lectures he delivered in the 1970s and 1980s was the impact of public opinion on the Supreme Court—a fact he saw as both inevitable and, to an extent, desirable.⁶²

Although there is much room for debate regarding the nature and extent of Rehnquist’s change, that something happened here is indisputable. Regardless of how one characterizes these cases, they raise one of the great questions about Rehnquist the man and the jurist—a question that screams out for some sort of insight by a biographer. Jenkins does not even go so far as to identify this as a question. The Rehnquist he has created for the reader could not change, therefore he did not change, therefore there is no puzzle to be explored.

IV. CONCLUSION

At the heart of the challenge of writing any biography is the need to create a coherent, unitary whole out of a subject’s life, uniting the personal with the public. The standard contribution of the judicial biographer is to probe behind the official pronouncements of the subject, unearthing their deeper meaning by linking jurisprudence with personality and character. A Justice’s written opinions are transformed into a reflection of something deeper. They become lenses into an inner self. This

61. Quoted in Terry Baynes, *Fanning furor, Justice Scalia says appeals court judge lied*, REUTERS, Sept. 17, 2012. Prior to his elevation, Rehnquist wrote that the Chief Justice “must be not only a jurist, but interlocutor of the judicial minstrel show, a planner, and occasionally a statesman. Surely training in the rough and tumble of politics is no hindrance to the performance of these tasks.” William H. Rehnquist, *Chief Justices I Never Knew*, 3 HASTINGS CONST. L.Q. 637, 639 (1976).

62. See, e.g., William H. Rehnquist, *Presidential Appointments to the Supreme Court*, 2 CONST. COMMENT. 319, 320 (1985); Rehnquist, *supra* note 6, at 697.

kind of scholarship can be illuminating. But it is also fraught with risks—as demonstrated in Jenkins’ relentless, ultimately flattening effort to “unmask” Chief Justice Rehnquist.

Jenkins writes that “Rehnquist often appeared to be living in a private world of his own invention” (p. xvi). Perhaps. Perhaps this might be said of us all. What is unquestionable, though, is that the Rehnquist of this partisan biography is one largely of the author’s own creation. He is not a fair representation of what we know about Rehnquist simply by virtue of his public record. He is not even an interesting or fully realized character—he fails as a product of biographical reconstruction. He is the unfortunate projection of a writer who disagrees with his subject’s legal and political views and who also took a visceral disliking to his subject on a personal level.

The Partisan is a failure as a work of biography. But it fails in some rather interesting ways. The book raises, if often inadvertently, important questions about Rehnquist and his legacy, as well as the general challenge of writing a biography of a modern Supreme Court Justice.